

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**FRESH DIRECT, LLC, AND UTF TRUCKING, INC.,
A SINGLE EMPLOYER¹**

Employer

and

Case No. 29-RC-10245

**LOCAL 810, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Amy Krieger, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. The parties stipulated that Fresh Direct, LLC, is a Delaware limited liability company, which is an internet based food and grocery business engaged in the business of selling meat, produce, seafood, cheeses, groceries and other food products to customers located in Manhattan, Brooklyn and Queens, New York. UTF Trucking, Inc.,

¹ The names of the parties appear as amended at the hearing.

is a domestic corporation solely engaged in delivering Fresh Direct, LLC's products by truck to customers located in Manhattan, Brooklyn and Queens, New York.

Further, the parties stipulated that at all times material herein, Fresh Direct, LLC and UTF Trucking, Inc., have been affiliated business enterprises with common premises and principal offices and places of business located in the same facility at 23-30 Borden Avenue, Long Island City, New York, herein called the Long Island City facility. They also share common ownership, directors, management, and supervision and have formulated and administered a common labor policy affecting employees of the said operations, provided services for and made sales to each other, interchanged personnel with each other and have held themselves out to the public as a single integrated business enterprise. By virtue of their operations, Fresh Direct, LLC, and UTF Trucking, Inc., herein collectively called the Employer, constitute a single integrated business enterprise and a single employer within the meaning of the National Labor Relations Act, as amended.

The parties further stipulated that during the past year, a period which is representative of the Employer's annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of \$500,000 from the sale of groceries and other food products, and purchased and received at its Long Island City facility, goods valued in excess of \$5,000 directly from enterprises located outside the State of New York.

Based on the stipulation of the parties and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Local 810, International Brotherhood of Teamsters, AFL-CIO, herein called the Petitioner or the Union, seeks to represent a unit² of all full-time and regular part-time truckers, helpers, walkers a.k.a. runners³ and yard jockeys employed in the Transportation Department at the Employer's Long Island City facility, but excluding all other employees, warehouse employees, guards and supervisors as defined in Section 2(11) of the Act.

Positions of the Parties; Witnesses

The Employer takes the position that the petitioned-for unit is inappropriate, and that the smallest appropriate unit would encompass all full-time and regular part-time production, maintenance, customer service and maintenance employees, but excluding all office clericals, professionals, supervisors, guards, and employees in the following departments: Human Resources, Technology/IT, Marketing, Merchandising, Creative, Finance and Purchasing. The Union takes the position that the petitioned-for unit is appropriate. At the hearing, the Union stated that it is not willing to proceed in an alternative unit, but in its brief, the Union stated that it is willing to proceed in an alternative unit, if the petitioned-for unit is deemed inappropriate by the Board.

² The petitioned-for unit appears as amended at the hearing.

³ The terms "walkers" and "runners" are used interchangeably herein.

The petitioned-for unit consists of about 100 drivers, 79 helpers, 81 walkers a.k.a. runners, and six yard jockeys, for a total of 266 employees in the petitioned-for unit, according to a chart provided by the Employer. The broader unit proposed by the Employer would include 806 employees.

The Employer's witnesses were James Smith, Senior Vice President of Logistics, Alex Ferry, a consultant currently serving as the Employer's Senior Vice President for the Transportation Department, James Moore, Senior Vice President of Human Resources Development and Secretary of the Board of Directors, and Ross Bogitch, Director of Customer Service. The Union's witnesses were route drivers Robert Casuso and Austin Lopez, depot truck drivers Javier Guzman and Heriberto Delgado, and John Plaza, a runner.

FACTS

OVERVIEW OF OPERATIONS AND JOB DESCRIPTIONS

The record reflects that the Employer is in the business of delivering food and groceries to customers' homes in Manhattan, Queens and Brooklyn, New York. Orders are placed either through the Internet, or by telephone to the Employer's Customer Service Department. Deliveries are synchronized in "waves," by zone and delivery time. The orders within each wave must be produced, picked, packed, sorted and loaded into trucks together. Each day, there are 15 to 20 waves, encompassing up to 25,000 cartons of groceries.

Smith testified that the first step in the Employer's production process is the delivery of food and grocery products to the Employer's Receiving Department by the Employer's vendors. At the same time, produce obtained at local markets is delivered to

the Receiving Department by Produce Department employees. The receipt of these goods is recorded in the Employer's computer system either by the Receiving Department, or by the production departments that process these goods: Dry Goods/Grocery, Meat, Deli, Produce, Seafood, Dairy, Freezer and Kitchen/Home Meal Replacement ("HMR"). The Receiving Department transports the goods to these various departments.

After being processed in the production departments, all food and grocery goods are then conveyed to the Unit Sortation Department, by means of conveyor belts, forklifts and pallet jacks. The food and groceries are packed into boxes in the Unit Sortation Department, and in some of the production departments. The packed boxes are then conveyed to the Shipping Department, where the trucks are loaded by means of conveyor belts going directly into the trucks. Transportation Department employees move the trucks to the correct shipping bay, drive the trucks to customers' homes and make deliveries. Returning Transportation Department employees bring their trucks to the Employer's yards, and bring any items refused by customers to the Receiving Department.

Smith testified in detail regarding the Employer's automated system, which reads, identifies and records items that have been scanned into the system, generates labels, and sends automated messages to employees in the production departments, instructing them as to where items should be placed and sorted. In addition, automated conveyor belts transport items throughout the facility. Employees in the production departments use hand-held scanning equipment, which reads the bar codes on the customer labels and on

the products themselves, and transfers the information into the Employer's computer system.

The record testimony regarding the job descriptions of employees in the petitioned-for unit, and additional employees in the broader unit proposed by the Employer, is summarized below. The record does not include job descriptions for all employees in the broader unit.

RECEIVING DEPARTMENT

Moore testified that a number of employees in the Receiving Department are stationed "out on the dock," where they receive shipments by vendors and ensure that the shipments are correct. According to Smith, employees in the Receiving Department transport the products delivered by the vendors to the appropriate production departments, by means of pallet jacks and forklifts used only within the Employer's facility. Although some of these products are entered into the Employer's computer system by employees in the production departments, some products are entered into the computer by certain Receiving Department employees, whose job titles were not disclosed.

DRY GOODS/GROCERY DEPARTMENT

Smith explained that non-refrigerated goods are processed in the Dry Goods/Grocery Department. Employees in this department pick, pack, tape and seal groceries, and consolidate them by weight and time. In addition, repackers take the product that was picked and packed, and make it look neat before the box is closed and sealed. Other employees in this department load the packed groceries on pallets and put them on conveyor belts, on their way to the Shipping Department.

FREEZER DEPARTMENT

It appears from the record that employees in the Freezer Department put frozen food into freezer(s). The Employer supplied a photograph of a freezer operator or “receive replenisher,” entering a freezer with a pallet jack containing ice cream.

MEAT DEPARTMENT

According to Smith, Meat Department employees cut and process meat products.

DELI/CHEESE/COFFEE/CANDY DEPARTMENT

The functions performed by the Deli/Cheese/Coffee/Candy Department employees include moving boxes, cutting deli products and cheese into portions and weighing, slicing and wrapping these products.

PRODUCE DEPARTMENT

According to Smith, employees in the Produce Department inspect the bulk produce, discard any spoiled produce, and put the fresh produce into containers, such as tomato carriers. In addition, they weigh the produce and attach customer labels.

Driver in Produce Department

Ferry testified that Eric,⁴ a tractor-trailer driver in the Produce Department, drives to local markets and brings produce back to the facility, which is selected and purchased by the Employer’s buyer. According to Moore, Eric also handles administrative work (the nature of which Moore did not specify) and makes sure that the produce he delivers to the facility goes to the correct department within the facility.

⁴ Last name not disclosed.

SEAFOOD DEPARTMENT

The job functions performed by the Seafood Department include butchering, scaling, filleting and weighing seafood.

DAIRY DEPARTMENT

Dairy Department employees receive, store and pick dairy products.

HMR DEPARTMENT

According to Smith, the HMR Department creates pre-cooked meals, which are conveyed on forklifts and pallet jacks to the Unit Sortation Department.

UNIT SORTATION DEPARTMENT

Smith testified that employees in the Unit Sortation Department scan products into the computer system, which creates a label with a customer name. They then pack products into boxes, and place them on conveyor belts leading to the Shipping Department. Some employees in this department rearrange the contents of the boxes prior to sealing, so that they will look neat. In addition, employees in Unit Sortation operate machines that create boxes out of pieces of cardboard.

SHIPPING DEPARTMENT

Smith testified that conveyor belts convey products from Unit Sortation, Grocery/Dry Goods and other departments, to the Shipping Department. There, boxes are sorted to the appropriate trucks (whether the sorting is accomplished by machines, employees or both is not clear), and the trucks are loaded by means of conveyor belts feeding directly into the trucks. The Shipping Department employs “loaders,” who apparently have a role in loading the trucks.

In addition, the record reflects that if a box is late, and the truck is still on site, a loader employed by the Shipping Department takes the late box to the truck with a hand truck, and loads the box manually. Ferry testified that this occurs six days per week. He knew of “one occurrence” in 2004 when instead of a loader, “a driver and/or helper may have gone into the plant to get those late boxes from the shipping dock and put them on the truck,” but he did not know “the exact day” of this incident and did not provide the name(s) of the “driver and/or helper” involved.

TRANSPORTATION DEPARTMENT

Route Drivers

Ferry testified that the Employer’s route drivers, also referred to as delivery drivers, drive tractor-trailer trucks loaded with groceries on set routes, most of which are in the borough of Manhattan. Usually with the aid of helpers, the drivers make deliveries to customers with hand trucks, and bring their tractor-trailer trucks back to the Employer’s facility at night.

The record reflects that when the route drivers and helpers report to work at the beginning of their day, in the cafeteria,⁵ the Transportation Department managers provide them with manifests containing customer orders and delivery routes, truck inspection sheets, customer invoices and Nextel cell phones. Their truck numbers are identified on their truck inspection sheets. The drivers and helpers look for their trucks in the Employer’s yards or in the street, usually with the help of the yard jockeys. Before departing on their routes, the route drivers put their hand trucks on their tractor-trailer trucks, check the condition of their trucks, organize the customer invoices and map out

⁵ Ferry testified that when work is light, drivers sometimes report to the yard trailer, rather than the cafeteria.

the most efficient routes. They then make their deliveries at the stops along their routes; Casuso estimated that each route consists of 50 or 60 stops. Another task performed by the drivers is to fill out an inspection report, indicating whether there is any body damage to the truck or problems with brakes, refrigeration units, or other equipment. At night, when they finish their routes, the drivers hand in their manifests, their Nextel telephones, and their inspection reports to the clerks in the yard trailer.

Helpers

Ferry testified that the Employer's helpers do not drive trucks, but they make deliveries in the same fashion as the route drivers.

Depot Drivers

The record reflects that the Employer's depot drivers drive "depot trucks," 24-foot trucks loaded with customer orders. The depot drivers drive their depot trucks into Manhattan, and park them in fixed locations, at addresses where there is a high volume of customers. Each depot driver is then met by four to seven runners, who travel on their own to where the truck is parked and make deliveries by hand truck.

Guzman, a depot driver, testified that when he reports to work, he goes up to the office and gets his paperwork, Nextel cell phone and walkie talkies for himself and the runners. The paperwork consists of the inspection report, invoices, manifests and a time sheet for the runners. After finding out his truck number, he asks the clerical personnel in the yard trailer where his truck is located, and obtains the key to the truck. He then inspects the truck, and waits for confirmation that all the orders that belong on the truck are complete. He then drives into Manhattan and "punches in" the runners. He assigns orders to the runners in the order that they appear at the depot truck, counting up the

boxes to ensure the order is complete and then moving on to the next runner. There are usually four to eight runners. If there are four runners, it takes about 40 minutes to get them “out and going.” Sometimes, runners return and make another trip within the same delivery window.

Shuttle Drivers

Guzman testified that during the week, about four times a week, when his first truckload of deliveries is finished, a shuttle driver brings a second full truckload of deliveries to where Guzman’s depot truck is parked. The shuttle driver then drives Guzman’s first, empty truck back to the facility, while Guzman and his runners handle the deliveries from the second truck. Delgado indicated that he worked as a shuttle driver for a brief period of time, because he had the necessary CDL license.

Driver for “Returns”

Bogitch testified that there is one driver, named “Max,”⁶ who goes back to customers and picks up items rejected by them. Before doing so, he meets with a dispatcher agent in the Customer Service Department, and gets a list of pickups to be made. The dispatch agent tells Max when they need to be picked up, and why.

Driver for Late Boxes

The record reflects that when there is a late or misloaded box, and the route driver who was supposed to deliver it is already out on his route, a driver in the Transportation Department, Maxwell Lam a.k.a. “EMS,” picks up the late or misloaded box in the Shipping Department, and drives it either to the customer or to the driver handling the

⁶ Last name not disclosed.

route. When the latter occurs, the route driver is contacted by either the Transportation Department managers or the Customer Service Department.

Occasional Marketing Functions Performed by Drivers

Ferry testified that managers in the Marketing and Merchandising⁷ departments have enlisted the aid of the drivers in distributing flyers to customers when they make deliveries. The flyers offer customers free desserts and other items, as a reward for ordering from the Employer more frequently. According to Ferry, the Marketing and Merchandising managers “train” the drivers on “how to market this idea.” In addition, Ferry stated that “some drivers on some days” hand out these flyers on the street, sometimes accompanied by marketing and customer service employees. This involves an average of two or three drivers per week. The record does not reveal how much time the two or three drivers devote to passing out flyers, or how often the customer service employees join them in this task. It appears from the record that marketing employees, employed by an outside contractor, are primarily responsible for distributing these flyers, in buildings and on street corners.

Walkers a.k.a. Runners

Plaza, a runner, testified that he reports to a depot truck driver at the same Manhattan location each day. He then gets his hand truck ready to make deliveries, gets the manifests and loads up the orders on his hand truck. He counts his boxes to ensure he has all the orders, and makes the stops on his route. He usually has to return to the depot truck to load up more boxes. There are usually at least four runners delivering orders from the same depot truck.

⁷ Neither party takes the position that the bargaining unit should include marketing and merchandising employees.

Yard Jockeys

Ferry testified that on a typical weekday, four or five yard jockeys move 40 to 95 trucks. First, the yard jockeys move the trucks from where they are parked in the Employer's yards, or in the street, to the shipping dock to be loaded. This involves moving the correct trucks into the correct loading bays. Next, the actual loading of the trucks is done by the Shipping Department. Once the trucks are loaded, the yard jockeys move the loaded trucks to the Employer's yards or to the street, and leave the trucks there for the drivers to take them on their routes. When a yard jockey takes a full truck out to the street, leaving an empty loading bay, he brings back another truck to be loaded. In addition, according to Smith, the yard jockeys enter the truck numbers and other information on log sheets, so that they can tell the drivers where their loaded trucks are parked. Smith testified that the yard jockeys also "help on a dispatch"⁸ and perform maintenance work on simpler items such as wiper blades and light bulbs.

CLERICAL EMPLOYEES IN THE TRANSPORTATION DEPARTMENT

Ferry testified that Hughlon Francis, Erica Simes and Jennifer K.⁹ work in the yard trailer, in the Employer's shipping yard. There, they collect information and forms from the drivers, enter some of the information into their computers, and bring the paperwork up to the office on the second floor of the Employer's facility. In addition, Francis uses scanning equipment to scan information on returned items into the Employer's computer system. According to Ferry, Francis is a clerk, and Simes and Jennifer K. are classified as runners. However, Ferry testified that the latter two

⁸ The dispatching function is normally performed by the supervisors and managers in the Transportation Department.

⁹ Ferry was not sure whether Jennifer's last name is "Kensington," or something else beginning with a "K."

employees only perform the work of runners when the Employer is short-staffed. The record does not reveal how often this occurs.

In addition, the Employer's witnesses summarized the job duties of Juan Carlos Matyas, Christina Dakin and Raisa Yaschenko. Matyas, an office clerk in the Transportation Department, fills out forms and enters the hours worked by the runners into the Employer's computerized time system. Dakin is an administrative employee in the Transportation Department who "helps with paperwork." Lastly, Yaschenko, a clerical employee in the Transportation Department, enters routing information into a computer, taking direction from the manager in charge of the Employer's software system. Yaschenko's work also involves scheduling the production employees. The Petitioner did not provide any contrary information, but did not take a position on whether these individuals should be included in the petitioned-for unit.

CORPORATE OFFICE SERVICES

Ferry testified that the Corporate Office Services ("COS") drivers deliver breakfast and lunch platters to commercial buildings. Unlike the drivers in the Transportation Department, who are on the UTF Trucking, Inc., payroll, the drivers in COS are on the Fresh Direct payroll and report to the Marketing Department. Since the Corporate Office Services drivers are not on the list of job classifications the Employer proposes to include in the broader unit, and neither party takes the position that Marketing Department employees should be included in the bargaining unit, I conclude that the Corporate Office Service drivers should be excluded from the bargaining unit.

LOGISTICS MAINTENANCE DEPARTMENT

Smith testified that the Logistics Maintenance department is responsible for maintaining all conveyor systems and racks in the Employer's facility.

MAINTENANCE DEPARTMENT

Smith testified that the Maintenance Department is responsible for maintaining the physical plant, including "the floors and that sort of thing."

Smith also testified that the Maintenance Department employs mechanics,¹⁰ who work on the refrigeration units on the Employer's trucks. In addition, there are outside contractors who perform this work.

CUSTOMER SERVICE DEPARTMENT

Bogitch testified that the Customer Service Department consists of 27 customer service agents, four supervisors, a coordinator and director. Of the 27 customer service agents, five have dispatch capabilities, including dispatch agents (referred to by the Employer's witnesses as "dispatchers") and dispatch assistants. Of the five, two are on duty at any one time.¹¹ The two dispatch employees are in constant contact with the Employer's drivers, often serving as liaisons between the drivers and the customers.¹²

According to Bogitch, the Customer Service Department answers telephone calls, responds to e-mails, and handles all manner of customer contacts, including telephone orders, complaints, and inquiries regarding the Employer's products, web-site, and the

¹⁰ Mechanics are not on the list of job classifications the Employer proposes to include in the bargaining unit, nor are they on the list of individuals the Employer proposes to exclude from the unit.

¹¹ These numbers are different from those in Employer's Exhibit 4, setting forth the Employer's proposed bargaining unit. Exhibit 4 indicates that there are 23 customer service agents, two dispatch agents, and five part-time on-call agents.

¹² Contacts between the two dispatch employees and the drivers are described in the next section, *infra*, "Contacts Among Departments and Temporary Interchange."

status of customer deliveries. The customer service agents uses “basic conflict resolution” techniques to handle problems with customers, and are empowered to issue credits for damaged or spoiled items. In addition, the Customer Service Department employees take telephone orders from customers, and enter them into the Internet on behalf of customers who order by telephone. Bogitch testified that the equipment used by the customer service agents includes personal computers (“PCs”) and telephones with head sets. The dispatch agents use Nextel cell phones.

Casuso testified that when a customer order contains damaged items, the driver gives the customer a card including the telephone number and e-mail address of the Customer Service Department. Similarly, Guzman asserted that he gives these cards to the runners to give to the customers, if they have questions about their orders, or to leave at customers’ homes if they are not there.

WORK LOCATION

Ferry testified that the managers and supervisors in the Transportation Department use the Employer’s cafeteria as a dispatching area. The route drivers and helpers report to work at the cafeteria at the beginning of their work shifts,¹³ while the depot drivers report to work in the Employer’s second-floor office area. Ferry estimated that drivers and helpers spend 95% of their time away from the facility, making deliveries. Casuso asserted that he does not spend more than 45 minutes each day in the cafeteria, awaiting an assignment.

The record reflects that the Employer’s runners do not report for work at the Employer’s facility. Rather, they report directly to the depot trucks to which they are

¹³ Ferry testified that when work is light, drivers sometimes report to the yard trailer, rather than the cafeteria.

assigned. Plaza, a runner, testified that the regular depot truck to which he reports is at the same location each day, in Manhattan, usually with the same driver (other than on the regular driver's days off). Plaza asserted that the runners' paychecks are brought to their depot trucks by their supervisor, Cabrera. It appears from the record that the runners only appear at the Employer's facility for monthly Transportation Department meetings, or if there are problems with their paychecks.

By contrast, the remaining employees in the unit proposed by the Employer spend all their time at the Employer's facility.

JOB QUALIFICATIONS

The Employer runs a criminal background check on all new employees. In addition, when evaluating applications for driver and yard jockey positions, the Employer checks their driving records to ensure that they have not had an excessive number of accidents or tickets.

Guzman, a depot driver, testified that he has a Class "B" Commercial Driver's License ("CDL") with hazardous materials ("Hazmat"), air brakes and passenger endorsements. According to Guzman, a Class "B" CDL is required to drive a truck weighing in excess of 26,000 pounds; the requirement is based on truck weight, not length.¹⁴ By contrast, Ferry maintained that a Class "B" CDL license is required when driving a 24-foot truck. Ferry did not know how many of the Employer's drivers have CDL licenses, but estimated that 16 of the Employer's 103 trucks are 24-foot trucks.

The record reflects that there are no educational requirements for drivers, but that employees in the Customer Service Department must have high school diplomas. There

¹⁴ Guzman's testimony is consistent with McKinney's Consol. Laws of New York, Vehicle and Traffic Law Section 501-a. Ferry's testimony is not.

is no further record evidence regarding the training, experience, or other prerequisites for employees seeking positions that do not involve driving.

TRAINING

TRANSPORTATION DEPARTMENT

The Employer's witnesses testified that new drivers are given a driving skills test by Nortay Oquaye, the Night Manager in the Transportation Department, before they can start driving a truck for the Employer. If they do not do well on the test, Oquaye gives them additional training, after which they repeat the test. Before assuming responsibility for their own routes, new drivers and helpers accompany more experienced drivers on their routes, to familiarize themselves with the Employer's trucks, the delivery process, and the procedures for dealing with customers. Typically, a new driver then serves as a helper for a short period of time. In addition, a driver named Paul Wilson has trained some of the other drivers on the tactics of maneuvering the Employer's trucks through New York City.

The record does not indicate whether yard jockeys or runners receive any training.

NON-TRANSPORTATION DEPARTMENT EMPLOYEES

Bogitch testified that customer service agents are given "intake training" by the Human Resource Department. During their first week on the job, new customer service agents ("CSAs") sit with more experienced CSAs. After their first week, they respond to customer telephone calls with a more experienced CSA sitting next to them. Subsequently, after taking a test, they "graduate" to being able to take telephone calls on their own.

There is no evidence regarding any training provided to employees in departments other than Transportation or Customer Service.

DRUG TESTING OF DRIVERS

The Employer conducts pre-employment drug testing for all employees hired as drivers, and pre-promotion or pre-transfer drug testing for all employees who are promoted or transferred to driver positions. In addition, drivers are tested for drugs and/or alcohol after every accident, and after drug or alcohol-related leaves of absence.

There is no evidence that the Employer tests employees other than drivers for alcohol or drugs.

SEPARATE SUPERVISION¹⁵

The record evidence demonstrates that employees in the Transportation Department are separately supervised. Each department manager is in charge of scheduling employees within that department, and managers and supervisors in the Transportation Department assign, schedule and dispatch the drivers. In addition, they write the performance evaluations for all Transportation Department employees¹⁶ and determine whether extra runners should be sent home.

The record reflects that the position of Senior Vice President for Transportation is currently open, but that the functions of this position are being performed by Ferry. In addition, the Employer's organizational chart indicates that the following managerial and

¹⁵ Based on the record evidence summarized below, I find that Ferry, Simpson, Oquaye, McTigue, Connelly, Boccia, Bualdo, Walker, Cabrera and Phillips are managers and/or supervisors as defined in Section 2(11) of the Act, and must be excluded from the bargaining unit.

¹⁶ The record does not reveal whether performance evaluations are factored into explicitly supervisory decisions, as defined in Section 2(11) of the Act, such as whether to reward, transfer, discipline or discharge employees.

supervisory positions within the Transportation Department are held by the following individuals:

Compliance Manager	Mike Simpson
Night Manager	Nortey Oquaye
Transportation Director	John McTigue
Manager	William Connelly
Supervisors	Scott Boccia Pablo Gualdo George Walker Felix Cabrera

Ferry stated that McTigue, whom he referred to as the Transportation Manager, reports to him, and that the supervisors in the Transportation Department, in turn, report to McTigue. McTigue is “responsible for the entire dispatch of all of the trucks every day, the scheduling of our people and all of the associated paperwork that has to occur on a daily basis in terms of tracking what occurs with all of our orders, accidents, personnel [issues such as] days off...vacations, etc.” A Transportation Department employee requesting time off would ask his immediate supervisor, who would sign off on the request and inform McTigue.

Connelly, whom Ferry referred to as the Dispatch Manager, oversees the supervisors and manages the dispatching of the trucks. In addition, Connelly goes to different parts of New York City to check the routes, and ascertain whether there are “issues” with the customers or the drivers. On McTigue’s days off, Connelly substitutes for him.

Ferry stated that Oquaye, the Night Manager, manages the maintenance of the trucks, and associated paperwork. Simpson, the Compliance Manager, administers safety

records, handles traffic tickets and accidents, oversees the maintenance of the trucks, collects information on damages to trucks, makes sure that the drivers have the proper licenses, and is responsible for compliance issues.

In addition, Ferry testified that Walker is the supervisor for the Brooklyn routes, and is in charge of getting the manifests printed each day and administering the distribution of the Nextel telephones. Boccia is in charge of the routes from Midtown Manhattan to the Upper East Side, and is responsible for handling any problems with customers and equipment. Gualdo is responsible for the routes in another (unspecified) area of Manhattan. He directs the drivers, checks their routes and resolves issues with customers. Finally, Cabrera is the supervisor for the depot drivers, and is responsible for the Employer's seven depot stops. According to Ferry, Cabrera "creates the routes" and manages issues such as "moving people around" if an insufficient number of walkers report for work.

The Employer's witnesses provided conflicting testimony with regard to the supervision of the six yard jockeys. Ferry testified that the yard jockeys are supervised by Sean Phillips,¹⁷ who reports to Nortey Oquaye, the night manager, and works from 4:00 a.m. until 12:00 noon. Ferry stated that after 12:00 noon, the remaining yard jockey is directed by the other Transportation Department supervisors. By contrast, Smith claimed that from midnight or 2:00 a.m. until about 8:00 a.m., or alternatively, until between 11:00 a.m. and noon, the yard jockeys fall under his control, because the Transportation Department supervisors and managers are not there during those hours. Smith testified that he "control[s] them, that group, which is four to five guys in the

¹⁷ Although Sean Phillips is not on the organizational chart, he is on the Employer's list of individuals who should be excluded from the bargaining unit.

operation, what they're doing, whether it's getting, you know, trucks are getting up fast enough, whether they need to do something different." However, Smith conceded that he does not determine the schedules for individual employees in any of the Employer's departments, and that he has no "control" over the drivers, helpers or runners.

DEPARTMENT MEETINGS

The record reflects that the Transportation Department managers hold two monthly meetings in the cafeteria, one for the runners and depot drivers, and one for the route drivers and their helpers.

CONTACTS AMONG DEPARTMENTS, TEMPORARY INTERCHANGE AND OVERLAPPING JOB DUTIES

LACK OF TEMPORARY INTERCHANGE BETWEEN THE TRANSPORTATION DEPARTMENT EMPLOYEES AND THE RECEIVING, LOGISTICS MAINTENANCE, PLANT MAINTENANCE, SORTATION, MEAT, SEAFOOD, PRODUCE, DELI/CHEESE/COFFEE/CANDY, BAKERY/PASTRY, DAIRY, HMR AND CUSTOMER SERVICE DEPARTMENT EMPLOYEES

The Petitioner's witnesses testified that employees in the Receiving, Logistics Maintenance, Plant Maintenance, Sortation, Meat, Seafood, Produce, Deli/Cheese/Coffee/Candy, Bakery/Pastry, Dairy, HMR and Customer Service departments have never, to their knowledge, driven the Employer's trucks, made deliveries to customers, or performed Transportation Department functions. Conversely, the Petitioner's witnesses testified that Transportation Department employees have never, to their knowledge, performed the job functions of employees in the Receiving, Logistics Maintenance, Plant Maintenance, Sanitation, Sortation, Meat, Seafood, Produce, Deli/Cheese/Coffee/Candy, Bakery/Pastry, Dairy, HMR and Customer Service departments. Smith confirmed that the drivers, helpers and runners do not perform work in the Grocery/Dry Goods, Meat and Poultry, Deli, Produce, Seafood, Dairy,

Kitchen/HMR and Freezer departments, and that the drivers “don’t know how to pack, you know, with our system.”

TEMPORARY INTERCHANGE AMONG PRODUCTION DEPARTMENT EMPLOYEES

Smith testified that production employees are moved among the various production departments on a daily basis. He did not provide specific examples, other than an assertion that the loaders, normally assigned to the Shipping Department, have performed work in the Unit Sortation department on an emergency basis. He did not indicate when, or how often, this has occurred.

CONTACTS BETWEEN TRANSPORTATION AND CUSTOMER SERVICE DEPARTMENT EMPLOYEES

The record reflects that the two dispatch employees in the Customer Service Department¹⁸ serve as intermediaries between the drivers, the customers, and customer service agents who deal directly with customers, with regard to late or early deliveries, damaged or missing items, customers who are not at home when deliveries are made, cancelled orders, customer requests to change the delivery time, and problems with doormen. In this regard, Casuso acknowledged that he contacts the Customer Service Department about ten times each day.

Ferry testified that the Customer Service Department trains the drivers on how to deal with customers, and when to call Customer Service. In addition, the runners may attend Customer Service Department training sessions and marketing sessions. Ferry did not indicate how often this occurs.

¹⁸ Of the five customer service employees with “dispatch capabilities,” two perform this work at any one time.

About ten times per year, according to Bogitch, customer service agents may ride with drivers to new geographical areas, to make presentations to new customers.

CONTACTS BETWEEN CUSTOMER SERVICE EMPLOYEES AND CLERICAL EMPLOYEE IN THE TRANSPORTATION DEPARTMENT

Bogitch testified that Melissa Granovelt is a customer service agent who deals with billing issues. If a customer disputes a charge because he or she did not receive a delivery, Granovelt sends an e-mail to the Transportation Department requesting the manifest, to check the customer's signature. "Somebody" then brings her the manifest. Bogitch did not know which Transportation Department employee Granovelt sends the e-mail to, but the Employer's drivers, helpers, runners and yard jockeys do not receive company e-mail.

TRANSPORTATION AND SHIPPING DEPARTMENT EMPLOYEES

Contacts between Yard Jockeys and Shipping Department Employees

The record indicates that Shipping Department employees and/or supervisors communicate with the yard jockeys regarding the required truck size for each truck load at each shipping bay, and regarding the loading of late boxes. Ferry testified that about twice a day, production employees may ask a yard jockey in the trailer where a certain truck is, so that they know where to put a late box.

Lack of Interchange Between Yard Jockeys and Shipping Department Employees

Ferry could not recall an instance when loaders in the Shipping Department moved Fresh Direct trucks. There is no evidence that yard jockeys have ever loaded or unloaded trucks.

Loading/Unloading Work Performed by Drivers and Helpers

Unloading

Casuso testified that he has performed unloading work with Shipping Department employees on three occasions. The first of these instances was in August, 2003, when Casuso drove a truck to and from a company picnic. At that time, Casuso helped to unload items from the truck both at the picnic site and back at the Employer's facility. The record does not disclose whether drivers other than Casuso have performed unloading work at company picnics.

According to Casuso, the second time he performed unloading work was also in the summer of 2003, during a power blackout affecting New York City and other areas. Since many customers were without refrigeration, there were many more returns than normal and some drivers, including Casuso, had to unload the returns from their own trucks.

Similarly, Guzman testified that on the day of the blackout, he had to bring back his loaded truck to the facility. McTigue asked him to unload his truck, but after unloading "like one pallet," Guzman refused to continue performing this work. He testified that this was the only time he performed unloading work.

Lopez testified that on the first night of the blackout, he had to return to the Employer's facility with 80% of his load, and was told to unload the contents of his truck onto pallets. However, he testified that McTigue and Connelly told the drivers not "to operate the hand jives or the hi-los, they had guys from the Shipping Department doing that."

The third and last instance of unloading testified to by Casuso was during a blizzard in early 2004. Because of the hazardous weather, the Transportation Department managers directed Casuso, and other drivers, to return to the facility with full trucks. The record does not indicate how many drivers performed unloading work at the time of this blizzard.

Loading

Delgado testified that he has never loaded trucks. However, Casuso testified that he performed loading work on several occasions. In one instance, he had to load trucks at the loading dock after being told, by a former manager, that there had been a walkout by the Employer's loaders. On a second occasion, there was a systems failure, and Casuso and other drivers had to work with the loaders to manually remove boxes from the loading dock and put them into the trucks. Normally, boxes are fed into the trucks by means of conveyor belts. In addition, on four occasions, when driving defective trucks, Casuso had to unload the contents of the defective trucks and load them onto replacement trucks. Casuso did not indicate when any of these incidents occurred; Smith and Ferry placed the systems failure in about the spring or early summer, 2004.

According to Smith, "it could be" that transportation employees are "helping load trucks" on holidays, such as Thanksgiving and Valentine's Day. He did not indicate how often this occurs, or how many transportation employees are involved. In addition, Smith maintained that on Sundays during the non-summer months, boxes sufficient in number to fill about five trucks are simply left to sit on the shipping dock by Smith's "people" to await the return of empty trucks to the facility, because there are not enough trucks to accommodate the volume of Sunday orders. These boxes are eventually loaded by about

five drivers, and their helpers, when they return to the facility after delivering their first load of deliveries for the day. Alternatively, the loading work may be performed by a new driver and helper assigned to deliver the second load.

CONTACTS BETWEEN TRANSPORTATION AND RECEIVING DEPARTMENTS

Returns

The record evidence disclosed that there are 7 to 14 returned items each day, resulting from cancelled orders and rejected items. The drivers bring the returns back to the facility on their trucks, and the returned items are scanned back into the system and entered onto a case log by Francis or Matos.¹⁹ The drivers and their helpers leave the returned items in the “Returns” area within the Receiving Department. The Receiving Department employees determine which returns have to be discarded. Returns that are not discarded are brought back to the departments where they originated by the Receiving Department employees, using pallet jacks.

Casuso testified that after his route, he turns in his manifest, truck inspection sheet and Nextel cell phone in the Transportation Department office, while his helper unloads the damaged and/or returned items and removes the hand trucks.

According to Guzman and Lopez, frozen food returns are handled in the same manner as any other returns. However, Casuso testified that once or twice per week, Transportation Department managers direct him to put returned items into the freezer. Casuso did not indicate whether he has any contact with Freezer Department employees on these occasions.

¹⁹ See *supra* p. 13-14.

CONTACTS BETWEEN CUSTOMER SERVICE AND PRODUCTION DEPARTMENTS

Bogitch testified that customer service agents interact with production employees for the purpose of familiarizing themselves with the Employer's products, so that they can better deal with customers. For example, the customer service agents were given a cheese-tasting tour.

In addition, Bogitch testified that on one occasion, six months ago, a number of production employees had the opportunity to work in the Customer Service Department for one day each. Drivers, helpers, yard jockeys and runners did not have this opportunity.²⁰

POTENTIAL CONTACTS AMONG CUSTOMER SERVICE, MARKETING, TECHNOLOGY AND CREATIVE DEPARTMENTS

Bogitch testified that a number of employees in the Marketing, Technology and Creative departments are "on standby," just in case there is too high a volume of telephone calls for the customer service agents to handle. These "standby employees" were not included by either party in their proposed bargaining units.

PERMANENT TRANSFERS

The Employer offered into evidence a chart entitled "Employee Transfers – Production & Transportation," and subtitled "Production to Transportation" and "Transportation to Production." The chart indicated that 16 employees were transferred to or from the Transportation Department since September, 2002. However, subsequent to the Hearing Officer's request for back-up documentation, the Employer revised the

²⁰ Bogitch testified that an e-mail message was sent to the "whole company," affording everyone this opportunity, but further questioning by the Hearing Officer revealed that the drivers, helpers, runners and yard jockeys do not have e-mail addresses.

chart to reflect that six of the 16 names were of “multiple employees with the same name” who never transferred. An additional three names were of employees who never transferred, but were rehired sometime after terminating their employment.

Among the remaining employees on the chart is Husein Kadribegic, who recently became a Junior Systems Engineer in the Technology Department. Previously, he held an office job in the Transportation Department. Thus, Kadribegic was never in the petitioned-for unit, and his transfer is of minimal relevance to the appropriateness of the unit sought.

In addition, there was contradictory evidence with regard to one of the transferred employees. Judy Murphy, formerly a picker/packer in the grocery department, is now either a driver in the Transportation Department, on the UTF payroll, or a driver in the Corporate Office Services (“COS”) Department, whose employees are on the Fresh Direct payroll, report to the Marketing Department, and are not in the broader unit proposed by the Employer. If Judy Murphy is now in the COS Department, she may never have been in the Transportation Department and therefore, may never have been in the petitioned-for unit. Christopher Torrence, a driver in the COS department who was formerly a driver in the Transportation Department, was also listed by the Employer among the permanently transferred employees.

In sum, the record reveals that since September, 2002, no more than six employees have transferred to or from the petitioned-for bargaining unit.

WORKING CONDITIONS

Use of Employer’s Facilities; Breaks

Smith asserted that all employees, other than the Customer Service Department, the Technology/IT Department and the Employer's managerial, supervisory and clerical staff, use the same bathrooms, cafeteria and vending machines. However, the record reflects that the drivers generally take their breaks on the road. Ferry stated that Transportation Department employees are instructed to "intelligently take their meal breaks and biological breaks as they see fit." In practice, according to Plaza, this translates into skipping lunch on busy days, or at most, getting 10 or 15 minutes to eat at the end of a two-hour delivery window, if he finishes early. By contrast, Moore testified that production employees receive paid half-hour lunch breaks and coffee breaks, as authorized by their supervisors.

Perhaps in recognition of the difficulties of "eating on the fly," Ferry testified that on Saturdays and Sundays, the Employer provides breakfast and lunch to employees in the Transportation Department. They can either eat the food in the cafeteria, or bring it with them on their trucks. However, it appears that the runners, who do not report to work at the Employer's facility, do not receive this benefit.

There was conflicting testimony regarding parking facilities for employees' personal vehicles.

Uniforms

The record reflects that members of the petitioned-for bargaining unit wear uniforms that are distinct from those of other employees. Each of the Employer's drivers, helpers and runners is provided with three orange or green "golf-type" short-sleeved shirts, between one and three pairs of blue or black pants and shorts, a Fresh Direct hat for summer wear, a hooded sweatshirt, a heavy jacket and a warm woolen hat. By

contrast, employees in the Kitchen/HMR Department wear kitchen whites, Unit Sortation Department employees wear aprons, and employees in the freezer department wear very warm clothes. Employees in the other production departments wear smocks that are color-coded by department for health reasons, inasmuch as entering a different food department could cause cross-contamination. The smocks of production employees who come into contact with fresh food are laundered internally, to ensure that they are sanitary, whereas the drivers, helpers and runners launder their own uniforms at home. All employees handling fresh foods wear special gloves, and all employees have to wear white bouffant hats to cover their hair while in the production facility.

Ferry testified that the Employer's yard jockeys are not required to wear Fresh Direct shirts. The two runners who work in the yard trailer are only required to wear these shirts when they are performing the functions of a runner. The record does not reveal how often this occurs.

ID Badges

The record reflects that every manager, supervisor and employee of the Employer wears an ID badge, color-coded by department, with the individual's photograph, serial number and department. The security guards check the IDs and bags of all employees.

"Scanning In"

Instead of punching time cards, employees other than runners enter their serial numbers into the computer system and put their hands into hand scanners when they arrive and depart from the Employer's facility. In addition, production employees have to scan in and out during their lunch breaks.

Unlike the other employees, the runners report to work at their depot trucks in Manhattan, and the depot drivers write down the runners' start and finish times on a time sheet. A clerical employee in the Transportation Department enters the runners' reporting and departure times into the computer system.

Electronic Mail Access

Bogitch testified that the Customer Service Department employees, and an unspecified number of production employees, regularly use electronic mail ("e-mail"). By contrast, the petitioned-for drivers, helpers, runners and yard jockeys do not have access to e-mail.

DEGREE OF CENTRALIZED CONTROL OVER PERSONNEL POLICIES AND DAY-TO-DAY OPERATIONS

Moore testified that the drivers, helpers, walkers and yard jockeys in the Transportation Department are on the UTF Trucking payroll. The other employees in the unit proposed by the Employer are on the Fresh Direct payroll. UTF Trucking maintains a separate bank account and a separate set of books, and there is a separate pay run for UTF employees. However, the Employer maintains a single time-keeping and payroll system, and files a consolidated tax return.

Moore asserted that there is one Human Resources Department for all employees, including Transportation Department employees, and one Manager of Recruiting for all hourly positions. All employees use the same job application form, and are subject to the same criminal background check. On their first day of work, all employees participate in the same initial intake session, in which they learn the Employer's policies and procedures and fill out forms. The same evaluation form is used for all departments.

According to Moore, all employees are given copies of a document entitled, “Fresh Direct Employee Manual (Office Staff/Plant),” which contains sections on employment at Fresh Direct, compensation, benefits, leaves, safety procedures within the plant (but not on the road), separation of employment, and workplace policies.

However, the record reflects that a separate document, entitled “FreshDirect Transportation’s Delivery Personnel’s Policies and Procedures,” and an additional set of procedures,²¹ are given to Transportation Department employees only. In addition, the Employer has a “Three Strikes” disciplinary policy which pertains to drivers only. Drivers are the only employees subjected to drug testing.

BENEFITS

The record reflects that full-time Fresh Direct employees in all departments are offered the same medical and dental benefits, 401(K) plan, debit card, discount program, personal time off, holidays, leaves of absence, and other benefits.

WAGES

Moore testified that the management of each department and the upper management of the company engage in joint decision-making in determining the introductory wage rates and maximum rates within each department. In addition, each department can make individualized adjustments in pay when employees finish their introductory periods or are given promotions, increased levels of responsibility, or favorable performance appraisals.

The employees in the petitioned-for unit, and most of the employees in the broader unit proposed by the Employer, are paid on an hourly basis. In addition, the

²¹ Petitioner’s Exhibit 11 contains step-by-step instructions for Fresh Direct drivers and helpers. The exhibit starts on page 2, and the title page appears to be missing.

Employer's drivers, helpers and runners are the only employees who receive tips from customers. By contrast, the driver in the Produce Department receives a salary, in an amount not disclosed by the record, and does not receive tips.

If a driver is in an accident, or incurs a fine for a parking or moving violation, the driver is required to pay a portion of the insurance claim or the fine. The record does not disclose whether this is true of drivers outside the Transportation Department.

The Employer produced a chart reflecting the average, minimum and maximum wage rates of employees in the unit proposed by the Employer. Wage rates for employees in the petitioned-for unit, employees in other job classifications with whom they come into contact, and employees in some of the larger job classifications, are set forth below, together with the number of employees in these various job classifications:

	<i>Average Hourly Wage Rate</i>	<i>Starting Rate</i>	<i>Maximum Rate</i>
<i>Transportation</i>			
Drivers (100)	\$12.05	\$11.00	\$15.00
Helpers (79)	\$9.32	\$8.00	\$13.00
Walkers/Runners (81)	\$8.54	\$8.00	\$12.00
Yard Jockeys (6)	\$10.50	\$8.00	\$13.50
<i>Shipping</i>			
Loaders (18)	\$7.64	\$7.00	\$8.15
<i>Receiving</i>			
Receivers (11)	\$8.86	\$7.00	\$11.00
<i>Customer Service</i>			
Account Services Agents (23)	\$10.73	\$10.00	\$14.00

Dispatch Agents (2) ²²	\$12.00	\$11.00	\$13.00
On-Call Agents (5)	\$10.00	\$10.00	\$10.00

Sortation

Inductors/Packers (87)	\$7.71	\$7.00	\$10.00
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Grocery

Picker/Packers (54)	\$7.66	\$7.00	\$8.25
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Produce

Pickers (35)	\$7.56	\$7.00	\$9.50
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WORK SCHEDULES²³

TRANSPORTATION DEPARTMENT

Ferry's testimony regarding the hours worked by the employees in the petitioned-for bargaining unit is summarized below:

Drivers and Helpers (Monday through Friday)

<u>Arrival Time</u>	<u>Percentage of Employees (Approximate)</u>
11:00 a.m.	10%
1:00 p.m. ²⁴	70%
3:00 p.m.	10%
5:00 p.m.	10%

²² Although documentation submitted by the Employer indicates that there are two Dispatch Agents in the Customer Service Department, there was testimony indicating that five Customer Service Agents (a.k.a Account Services Agents) have "dispatch capabilities."

²³ In addition to the testimony summarized above, the Employer supplied punch-in and punch-out times for one week in March, 2004, and three weeks in July, 2004, in response to the Petitioner's subpoena tuces tecum. Most of this documentation lacks page numbers and has to be cross-referenced to another document to ascertain the employees' job classifications. Accordingly, I have relied on the testimony of the Employer's witnesses, who admitted that the employees in the petitioned-for unit do not work the same hours as other employees in the broader unit proposed by the Employer.

²⁴ Smith confirmed that on weekdays, the largest number of trucks is dispatched between 1:00 and 2:00 p.m.

Drivers and Helpers (Saturdays)

<u>Arrival Time</u>	<u>Percentage of Employees (Approximate)</u>
6:30 a.m.	20%
7:00 a.m.	30% ²⁵
8:00 a.m.	10-20%
10:00 a.m.	10-20%
12:00 p.m.	10%
4:00 p.m.	20-30%

Drivers and Helpers (Sundays)²⁶

6:30 a.m. ²⁷	Earliest group of drivers / helpers arrives
11:30 p.m.	Last delivery of the day

Yard Jockeys

<u>Arrival Time</u> ²⁸	<u>Number of Employees</u>
11:00 p.m.	1
12:00 a.m.	1
2:00 or 3:00 a.m.	2

Casuso, a route driver, testified that he works six days per week, reporting to work at 1:00 p.m. on Mondays through Thursdays, at 11:00 a.m. Fridays, and at 7:30 a.m. on Sundays. On Sundays, Casuso returns to the facility between 9 p.m. and 10:30 p.m.

²⁵ Smith testified that on Saturdays, 90% of the trucks go out at 7:00 a.m.

²⁶ Ferry did not complete his testimony with regard to working hours on Sundays.

²⁷ Smith testified that on Sundays, about half the trucks are dispatched at 7:00 a.m.

²⁸ Smith testified that the yard jockeys arrive for work between 12:00 a.m. and 4:00 a.m. The record does not disclose whether yard jockeys' weekend schedules differ from their weekday schedules.

when he handles a double load, and between 1:00 p.m. and 5:00 p.m. if he takes a single load.

Guzman, a depot driver, testified that he works five days per week, from Monday through Friday, from noon until about 11:30 p.m.

Plaza, a runner, testified that he reports to his depot truck at 1:00 p.m. Mondays through Thursdays, at 10:30 a.m. on Fridays, at 6:30 a.m. on Saturdays, and at 8:00 a.m. on Sundays. It appears from his testimony that he works seven days per week.

Clerical Employees in the Transportation Department Yard Trailer

Ferry testified that Francis, Simes and Jennifer K. work from 4:00 p.m. until midnight.

CUSTOMER SERVICE EMPLOYEES

Bogitch testified that both the customer service agents and the Transportation Department employees are scheduled in accordance with the Employer's delivery windows, i.e., the two-hour time slots in which deliveries to customers are made. He testified that on Saturdays, the Employer's delivery windows run from 7:30 a.m. until 7:00 p.m., and that the call center closes at 10:00 p.m.

Bogitch's testimony regarding the hours worked by the customer service employees is summarized below:

Customer Service Agents (Monday through Friday)²⁹

<u>Arrival Time</u>	<u>Percentage of Employees (Approximate)</u>
8:00 a.m.	30%
4:00 p.m.	balance (70%)

²⁹ Bogitch did not testify regarding the weekend schedules, if any, of Customer Service employees other than the dispatch agents.

Dispatch Agents (Saturdays and Sundays)

<u>Arrival Time</u>	<u>Number of Employees</u>
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7:30 a.m.	2
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Dispatch Agents (Monday through Friday)

<u>Arrival Time</u>	<u>Departure Time</u>	<u>Number of Employees</u>
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2:00 p.m.	10:00 p.m.	1
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4:00 p.m.	“closing” ³⁰	1
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Smith testified that the first group of customer service employees arrives at 7:00 a.m., and the last group of customer service employees leaves between 12:00 and 12:30 p.m. He did not differentiate among different job classifications within customer service, or between weekday and weekend schedules.

RECEIVING AND MAINTENANCE EMPLOYEES

According to Smith, the Plant Maintenance Department and the Receiving Department are in operation 22 hours per day, and the Logistics Maintenance department operates 20 hours per day, from 12:00 a.m. until 10:00 p.m.

PRODUCTION EMPLOYEES

Smith indicated that some production employees work five days per week, and others work six days per week but will eventually be switched to a five-day schedule. According to Smith, most production employees have left the facility by between 11:00 a.m. and 2:00 p.m. Smith’s testimony regarding the working schedules of the production employees is summarized below:

Production Employees (weeknights/weekdays - Sunday night to Friday morning)

From 9:00 p.m. until between 5:00 a.m. and 7:00 a.m.

³⁰ The time of “closing” is not reflected in the record.

A portion of the meat, seafood, freezer and dry goods/grocery departments

From 12:00 midnight until between 9:00 a.m. and 1:00 a.m.

Deli/cheese department; balance of the meat, seafood and freezer departments³¹

From 1:00 a.m. until between 11:00 a.m. and 1:00 p.m.

Balance of the dry goods/grocery department

From between 2:30 and 3:00 a.m. until between 11:30 p.m. and 1:30 p.m.

Produce department

From between 2:30 and 3:00 a.m. until between 2:00 and 3:30 p.m.

“Another group” from the freezer department

From 4:00 a.m. until between 2:00 and 3:30 p.m.

Unit sortation

Starting at 4:00 a.m.³²

Shipping department

From 7:00 a.m. until midnight - multiple, 8-9-hour shifts through the day

Kitchen/HMR department

Driver in Produce Department

Ferry testified that Eric, a tractor-trailer driver in the Produce Department who drives to local markets and brings produce back to the Employer’s facility, works from midnight to 6:00 a.m.

³¹ Smith subsequently testified that additional freezer department employees arrive between 2:30 and 3:00 a.m.

³² There was conflicting testimony as to when the Shipping Department employees finish their work.

DISCUSSION

It is well-established that “there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be ‘appropriate.’” *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950)(emphasis in original), *enfd on other grounds*, 190 F.2d 576 (7th Cir. 1951). Accordingly, in making unit determinations, “the Board first considers the union’s petition and whether that unit is appropriate.” *P.J. Dick Contracting*, 290 NLRB 150, 151 (1988). If it is “not appropriate, the Board may examine the alternative units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties. The Board generally attempts to select a unit that is the ‘smallest appropriate unit’ encompassing the petitioned-for classifications.” *Overnite Transportation Company*, 331 NLRB No. 85 (2000).

The criteria applied by the Board in making unit determinations include “distinctions in skills and functions of particular employee groups, their separate supervision, the employer’s organizational structure and differences in wages and hours, as well as integration of operations, and employee transfers, interchange and contacts.” *Atlanta Hilton and Towers*, 273 NLRB 87, 90 (1984); *see also Seaboard Marine, Ltd.*, 327 NLRB 556 (1999). Additional relevant factors include fringe benefits and other working conditions, work location, degree of centralized control over the employer’s day-to-day operations and personnel policies, and previous bargaining history (or lack thereof) at the Employer. *See J.C. Penney Company, Inc.*, 328 NLRB 766 (1999); *Transerv Systems, Inc.*, 311 NLRB 766 (1993); *Allied Gear and Machine Company, Inc.*,

250 NLRB 679 (1980). By weighing these various factors, the Board determines whether the employees in the proposed unit “share a sufficiently distinct community of interest from other employees as to warrant a separate unit,” *Transerv*, 311 NLRB at 766, or conversely, whether other employees share such a strong community of interest with the employees in the proposed unit that their inclusion in the unit is required. *J.C. Penney*, 328 NLRB at 766.

In evaluating the appropriateness of truck driver or transportation department units, the Board decides each case on its individual facts. For example, in *Levitz Furniture Company*, 192 NLRB 61 (1971), relied on by the Employer herein, the Board held that a unit of truckdrivers and truckdriver helpers did “not constitute a functionally distinct group with special interests sufficient to warrant their separate representation.” *Levitz*, 192 NLRB at 62. Although the truckdrivers and helpers spent most of their time away from the plant, they spent a “substantial portion of their time working alongside, or in close proximity with, other employees, and other employees also ma[d]e truck deliveries.” *Levitz*, 192 NLRB at 62. In addition, they were under the same common supervision as several of the store employees, and their hours and benefits were the same. *Levitz*, 192 NLRB at 62. In *Philco Corporation*, 146 NLRB 867 (1964), a separate unit of truckdrivers was found inappropriate, where driving trucks was only a “minor part” of their job duties, only 5% of their time was spent off plant property, and most of their time was spent loading, unloading, and working closely with other plant personnel whose job duties were similar to theirs. *Philco*, 146 NLRB at 870. There were frequent transfers into and out of the petitioned-for unit, and unit employees’ hours, benefits and salary ranges were the same as those of other plant employees. *Philco*, 146 NLRB at 870.

By contrast, in *Rinker Materials Corp.*, 294 NLRB 738, 739 (1989), the Board found that two separate units, one of production and maintenance employees, and the other of truck drivers, constituted “two distinctly identifiable groups sharing their own respective community of interest.” *Rinker*, 294 NLRB at 739. Although the two groups were commonly supervised, *Rinker*, 294 NLRB at 739 n. 5, “the two groups performed significantly different functions, possessed different skills...and there was insubstantial interchange of employees between the two groups. Further, the drivers spent the greatest portion of their time outside the plants, whereas the production and maintenance employees [were] confined primarily to the Employer’s plant premises.” *Rinker*, 294 NLRB at 739.

Similarly, in *Home Depot USA, Inc.*, 331 NLRB 1289 (2000), the Board concluded that the petitioned-for unit of drivers, and dispatchers who drive, shared a sufficiently distinct community of interest to constitute an appropriate unit, despite such factors as the lack of separate supervision or separate departmental affiliation, a high rate of permanent transfers, company-wide benefits and work rules, shared facilities, and combined training and orientation. *Home Depot*, 331 NLRB at 1289, 1291. In arriving at this conclusion, the Board stressed that the drivers spent a majority of their work time on the road making deliveries, were required to have special driving qualifications, licensing and certifications, and wore distinct uniforms. *Home Depot*, 331 NLRB at 1289, 1291. Further, the drivers had to undergo periodic drug testing and pass a driving test. *Home Depot*, 331 NLRB at 1289. Despite some degree of interchange and contacts with other employees, these contacts were incidental to the drivers’ primary job function of operating the delivery trucks, preparing for and making deliveries. *Home Depot*, 331

NLRB at 1291. Although the drivers spent up to 30 to 40% of their time in the store, pulling merchandise for delivery (a function usually performed by “pullers”), their work schedules did not overlap with those of the pullers, and there was no significant interaction between the drivers and pullers. *Home Depot*, 331 NLRB at 1289, 1290. While in the store, the drivers sometimes escorted customers to knowledgeable sales associates, but they were not trained to sell merchandise themselves, and their interaction with the sales associates was minimal. *Home Depot*, 331 NLRB at 1290. Other employees occasionally assisted the drivers in making deliveries, but no other employees drove the delivery trucks. *Home Depot*, 331 NLRB at 1290, 1291.

The facts of the instant case are closer to *Home Depot* and *Rinker Materials* than they are to *Levitz* or *Philco*. Thus, the employees in the petitioned-for unit have distinct functions and skills, pertaining to the transportation and delivery of customer orders. They wear distinct uniforms. There is insubstantial interchange. Unlike most employees in the broader unit proposed by the Employer, members of the unit sought by Petitioner spend the greatest portion of their time outside the plant premises. The runners are at the plant so seldom that they sign in manually, at their depot trucks, rather than “scanning in” like all other employees. Moreover, the drivers must pass a driving test and have good driving records, and a number of drivers are required to possess Class B commercial driver’s licenses. The drivers are the only employees who are subject to drug testing.

In addition, employees in the petitioned-for unit are separately supervised, and participate in a separate training program. Transportation Department employees are on the payroll of UTF Trucking, Inc.; all other employees are on the payroll of Fresh Direct, LLC. There are departmental meetings attended only by employees in the petitioned-for

unit. Despite testimony that all workers receive the same employee manual, the Transportation Department also has separate disciplinary policies and separate policy and procedure manuals.

Further, the employees in the broader unit proposed by the Employer have greatly varied work schedules. When the employees in the petitioned-for unit report for work, most of the production employees have already left for the day. Each job classification has a different wage scale, and individual raises are determined on a departmental level. Moreover, the petitioned-for drivers, helpers and runners are the only employees who receive tips. They are also the only employees whose ability to take a lunch break, on the road, depends on the rapidity with which they can make deliveries. Since they spend most of their working hours away from the Employer's facility, making deliveries, they are unable to take full advantage of the cafeteria, vending machines and rest rooms they share with the production and maintenance employees.

With regard to employee interchange, the record reflects that in nearly two years, no more than six employees have permanently transferred into or out of the petitioned-for unit, which consists of 266 employees. The drivers, helpers, runners and yard jockeys do not fill in or substitute on a temporary basis for employees in other departments, and employees in other departments do not fill in for them. In rare instances, primarily in emergency situations, some drivers and helpers have loaded and unloaded trucks, but they were not filling in or substituting for loaders in the Shipping Department. Moreover, this work was only incidental to their main function of driving and moving trucks, and making customer deliveries. The loaders, whose wage rates are substantially

lower than those of the employees in the petitioned-for unit, have never performed driving or delivery work.

Although some employees in the Transportation Department bring returned items to the Receiving and Freezer departments, there is no evidence of meaningful or substantial contacts among the employees in these three departments. Further, despite substantial contacts between the drivers and a few individuals in the Customer Service Department, these employees do not fill in for one another, and their job duties, qualifications and training programs are distinct. Finally, while the drivers spend most of their time on the road, making deliveries, the Customer Service employees work in the office area on the second floor of the Employer's facility. The latter do not use the same cafeteria, vending machines or rest rooms as the non-office employees.

Based on all of the factors set forth above, I find that the petitioned-for unit has a distinct identity and constitutes an appropriate unit, notwithstanding factors such as shared benefits and integration of operations, indicating that a broader unit may also be appropriate.

Driver in Produce Department

"Eric," the driver in the Produce Department, has job functions which overlap with those of the drivers in the petitioned-for bargaining unit. However, his job description includes administrative work, and does not include making deliveries to customers. Unlike the drivers in the petitioned-for unit, he does not receive tips, and is paid a salary. It appears from the record that he does not attend Transportation Department meetings, because he is in a different department, under different supervision. Unlike the drivers in the petitioned-for unit, he is on the payroll of a

different company. There is no evidence of interchange or contacts between the Produce Department driver and the drivers the Petitioner seeks to represent. The Produce Department driver could potentially be part of a departmental unit, or a unit of production and maintenance employees. Accordingly, I find that his inclusion in the unit is not necessary.³³

Clerical Employees in the Transportation Department

The evidence is uncontested that Hughlon Francis, Juan Carlos Matyas, Christina Dakin and Raisa Yaschenko are clerical employees. Neither party takes the position that clerical employees should be included in the unit.

However, the record indicates that Erica Simes and Jennifer K. perform clerical work, but are classified as runners. They perform the work of runners when the Employer is short-staffed, but the record does not reveal how often this occurs. The Board has held that “dual function employees, employees who perform more than one function for the same employer, may vote even though they spend less than a majority of their time on unit work, if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit.” *Martin Enterprises*, 325 NLRB 714, 715 (1998)(citations omitted). In the absence of evidence indicating how often Erica Simes and Jennifer K. perform unit work, I am unable to determine whether they should be included in the unit. Accordingly, these two individuals should vote under challenge.

I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

³³ I note that the Employer does not seek the inclusion of the COS drivers in the bargaining unit.

All full-time and regular part-time truckers, helpers, walkers a.k.a. runners and yard jockeys employed in the Transportation Department at the Employer's Long Island City facility, but excluding all other employees, warehouse employees, Produce Department drivers, Corporate Office Services drivers, guards and supervisors as defined in Section 2(11) of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire

to be represented for collective bargaining purposes by Local 810, International Brotherhood of Teamsters, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **October 5, 2004**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **October 12, 2004**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: September 28, 2004, Brooklyn, New York.

/S/ ALVIN BLYER

Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201